SKIP MYERS

IBLA 2000-1 Decided October 8, 2003

Appeal from a decision of the Field Manager, Phoenix Field Office, Arizona, Bureau of Land Management, providing notice of noncompliance with 43 CFR Subpart 3715, and ordering the immediate suspension of residential occupancy of a placer mining claim. AZA-30057-O.

Motion to dismiss denied; set aside and remanded.

1. Mining Claims: Placer Claims--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

Except where otherwise allowed by applicable laws or regulations, for activities that are defined as casual use or notice activities under 43 CFR Part 3800 or Subpart 3809, a mining claimant is prohibited from commencing residential occupancy before consulting with BLM. 43 CFR 3715.6(c). Consultation with BLM is initiated by the submission of a detailed map that identifies the site and the placement of temporary and permanent structures, and a written description showing how the proposed occupancy is reasonably incident to prospecting, mining, or processing operations and conforms to the requirements of 43 CFR 3715.2 and 3715.2-1. In addition to the placement of structures, the mining claimant must describe how long they are expected to be used, and the schedule for removing them and reclaiming the affected land at the end of operations. 43 CFR 3715.3-2. A claimant must not begin occupancy until he has complied with 43 CFR Subpart 3715 and BLM has completed its review and made the required determination of concurrence or non-concurrence in the occupancy.

2. Mining Claims: Placer Claims--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

   Even though appellant had long occupied his mining claim, the placement on the claim of a ramada and two camp trailers constituted new occupancies, regardless of whether they were actually or continually used for residential purposes, which required consultation with BLM so that BLM could adjudicate each specific proposed occupancy and issue a "decision" either concurring or not concurring with it pursuant to 43 CFR Subpart 3715.

3. Mining Claims: Placer Claims--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

   Absent a determination that residential occupancy of a mining claim was not reasonably incident to prospecting, mining, or processing operations or not in compliance with 43 CFR 3715.2, 3715.2-1, 3715.3-1(b), 3715.5, or 3715.5-1, and that immediate suspension was necessary to protect health, safety, or the environment, BLM could not properly order the immediate, temporary suspension of occupancy pursuant to 43 CFR 3715.7-1(a).

4. Mining Claims: Placer Claims--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

   To issue a cessation order, it is not necessary for BLM to determine and conclude that an occupancy that is not reasonably incident threatens public health, safety, or the environment (43 CFR 3715.7-1(b)(1)(i)). It is necessary to show or determine lack of timely compliance with a notice of noncompliance (43 CFR 3715.7-1(b)(1)(ii)), an order issued pursuant to paragraph (d) (43 CFR 3715.7-1(b)(1)(iii)), or corrective action ordered during a suspension (43 CFR 3715.7-1(b)(1)(iv)). The record contains no such prior order, and accordingly, the order involved in this appeal cannot be deemed to be a cessation order.

5. Mining Claims: Placer Claims--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

When on appeal it is determined that an immediate suspension order is defective and could be sustainable only if deemed a notice of noncompliance, the notice will be set aside and the case remanded so that BLM can decide how it wishes to proceed and issue a new decision that conforms to the requirements of 43 CFR 3715.7-1. If BLM concludes that a notice of noncompliance is appropriate, BLM must establish a date for starting corrective action, 43 CFR 3715.7-1(c)(ii), and a date by which it shall be completed, 43 CFR 3715.7-1(c)(iii). However, the regulation does not require completion of corrective action within 30 or fewer days. Therefore, nothing prevents BLM from establishing a completion date that coincides with issuance of a concurrence determination. Issuance of a concurrence determination ensures that mining claimants will not needlessly expend time and money in removing occupancies in which BLM ultimately concurs, or risk exposure to more serious enforcement action while waiting for a concurrence determination.

APPEARANCES: Skip Myers, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Skip Myers has appealed from an August 20, 1999, decision of the Field Manager, Phoenix Field Office, Arizona, Bureau of Land Management (BLM), notifying him that he was in noncompliance with 43 CFR 3715.6(c), and ordering the immediate suspension of residential occupancy of the JAH's Gift No. 1 placer mining claim, AMC-337374. [1/]

[1/] The JAH's Gift No. 1 placer mining claim is located on public lands in the W½NE¼ sec. 13, T. 7 N., R. 1 W., Gila and Salt River Meridian, Yavapai County, Arizona, near French Creek. Myers originally located the claim, which was described as 1,320 feet long and 660 feet wide, on Nov. 7, 1995, and filed a copy of his notice of location for recordation with BLM on Jan. 10, 1996.

On October 15, 1996, pursuant to 43 CFR 3715.4(b), Myers filed a form entitled "Existing Occupancy Notification" (AZA-30057-O). Myers stated that he was occupying the JAH's Gift No. 1 mining claim in a manner he deemed to be reasonably incident to prospecting, mining, or processing operations. The effect of the filing was to afford Myers, pursuant to 43 CFR 3715.4(b), a one-year grace period for bringing his existing occupancy of the claim into compliance with the requirements of 43 CFR Subpart 3715. That Subpart limits the residential occupancy of mining claims to that permitted by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000). ALANCO Environmental Resources Corp., 145 IBLA 289, 298 n.17 (1998); see Thomas E. Smigel, 156 IBLA 320, 323 (2002).

On January 8, 1997, Myers filed a notice of proposed operations (AZA-30057) pursuant to 43 CFR 3809.1-3. He stated that he intended to excavate and crush placer ore each year until 2007, and to run the resulting material through sluices and other equipment to extract gold, silver, and other minerals. Myers proposed to construct two temporary buildings to be used to house ore processing operations and store mining equipment, noting that there were several existing structures consisting of one small trailer, two campers, two tents, and one bus that had been converted into a mobile home. Myers stated that he would drill a water well, and install water tanks and a septic tank system. He further stated that areas affected by mining operations would be backfilled and otherwise reclaimed on a continuing basis and at the end of operations, whereupon all structures would be removed and the area cleaned and restored to a natural condition. Myers noted that mining and related operations would disturb no more than five acres.

On October 15, 1997, J. Schuler, a BLM surface protection specialist, inspected the JAH's Gift No. 1 claim and found two camp trailers and two camper shells within the claim boundaries. (3809 Field Inspection Form, dated Oct. 18, 1997.) Schuler also noted that mining activity consisted solely of excavating placer ore using a shovel: "There is no heavy equipment such as backhoe, dozer, trommel[,] pickup trucks etc[.] on the site and no evidence this equipment has ever been in use here." Id.

BLM considered the one-year grace period afforded by 43 CFR 3715.4(b) to ended on October 18, 1997. [2/]

[2/] Regulation 43 CFR 3715.4(b) states that the grace period extended for "one year after that date," referring back to Aug. 15, 1996, the effective date of 43 CFR Subpart 3715 (61 FR 37115 (July 16, 1996)). The regulation also required notification of existing occupancy by Oct. 15, 1996. It appears that BLM may have extended the grace period to Oct. 15, 1997, one year after the deadline for filing the existing occupancy notification form. See 61 FR at 37122 ("Taken together,

(continued...)

J. Hutchison, a BLM surface protection specialist, inspected the JAH's Gift No. 1 claim on July 8, 1999, finding evidence of expanded residential occupancy in the form of a "ramada" (a wooden structure with a sloped roof and open sides) covering one of the two original camp trailers and a common cooking and eating area, a 24-foot "Dutchman" camp trailer (with current Wisconsin registration), and a 30-foot "Cree" camp trailer (with outdated Arizona registration). (3809/3715 Field Inspection Form, dated July 8, 1999, at 1.) The Dutchman and Cree camp trailers, which apparently were unoccupied at that time, were located a short distance north of the "main site," 100 and 250 yards, respectively. Id. Hutchison also noted that mining activity using hand tools continued. Id.

By letter dated August 18, 1999, the Field Manager notified Myers that as of October 18, 1997, the end of the one-year grace period, he was required to obtain BLM's written concurrence in order to continue his occupancy of the JAH's No. 1 mining claim, and specified the steps he must take to obtain that concurrence. Thus, within 45 days of his receipt of the letter, Myers was required to make a "3715 filing" to comply with 43 CFR 3715.3. (Letter to Myers, dated Aug. 18, 1999 (Aug. 18 Letter), at 1.) Myers was required to provide a detailed map of the mine site showing the placement of temporary and permanent structures, and a "written description of * * * [his] occupancy." 43 CFR 3715.3-2; see Aug. 18 Letter at 2. In addition, he was directed to demonstrate that his occupancy was "reasonably incident" to prospecting, mining, or processing operations. 43 CFR 3715.3-2; see 43 CFR 3715.0-5 ("Reasonably incident"); Aug. 18 Letter at 1.

To obtain BLM's concurrence with an occupancy, 43 CFR 3715.3-2 requires a claimant to describe in detail how his occupancy "meets the conditions specified in [43 CFR] § 3715.2 and § 3715.2-1." Accordingly, the Field Manager also specified the steps Myers was to take to comply with those regulations. Myers was to demonstrate that he was engaged in work which was "substantially regular" and was "reasonably calculated to lead to the extraction and beneficiation of minerals," that it involved "observable on-the-ground activity that BLM may verify," and that it used "appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts." 43 CFR 3715.2; see Aug. 18 Letter at 1-2. He was also to demonstrate that his occupancy involved at least one of the activities set forth in 43 CFR 3715.2-1 and obtain the necessary

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[2/] (...continued)
[43 CFR] §§ 3715.4 and 4-1 allow your existing occupancy a one-year grace period from compliance with this final rule if you timely notify BLM of the occupancy"). How the grace period was further extended to Oct. 18, 1997 (a Saturday) is not explained. In any event, for the purpose of this decision, it does not matter whether the end of the grace period occurred on Aug. 15, Oct. 15, or 18, 1997.

Federal, State, and local permits or other authorizations, as required by 43 CFR 3715.3-1(b), and submit appropriate proof thereof. See Aug. 18 Letter at 2-3.

Lastly, the Field Manager stated that, upon receipt of the 3715 filing, BLM would conduct an inspection on October 20, 1999, after which it would decide whether to concur with Myers' occupancy. He noted that failure to file could result in BLM initiating action to terminate Myers' occupancy, as well as taking other administrative, civil, or criminal action pursuant to 43 CFR 3715.7 and 3715.8.

Myers received the Field Manager's August 1999 letter by certified mail, return receipt requested, on September 1, 1999.

In his August 20, 1999 decision, which was styled a "Notice of Immediate Suspension," the Field Manager notified Myers that he was in noncompliance with 43 CFR 3715.6(c) because he failed to consult with BLM, as required by 43 CFR 3715.3, before initiating further residential occupancy of the JAH's Gift No. 1 claim after the one-year grace period ended. The Field Manager identified new residential occupancy in the form of the ramada on the main claim site, a second residential occupancy away from the main site in the form of the Dutchman camp trailer registered in Wisconsin, and a third occupancy just north of the second site in the form of the Cree trailer registered in Arizona. All of these structures were observed during the July 8, 1999, inspection, but had not been on the claim during the October 15, 1997, inspection. The Field Manager ordered Myers to remove the additional structures within 30 days of receipt of the decision pursuant to 43 CFR 3715.7-1(a).

The Field Manager informed Myers that, in the alternative, he could elect to resolve the noncompliance by submitting the information called for by 43 CFR 3715.3-2 within 15 days of receipt of the decision:

> For these occupancies to remain on public land, you must receive a determination of concurrence from the BLM. The BLM will attempt to complete the review of your submission within 30 days of the date of your filing. If BLM does not concur with the described occupancy, or if BLM is unable to complete the review in this time frame, this order stands as written and you must remove the three new occupancies * * * within 45 days from the effective date of this order.

(Decision at 2.) [3/] The Field Manager noted that failure to comply with the order to suspend residential occupancy of the mining claim could subject Myers to further civil and/or criminal action or penalties. In addition, he stated that if any of the three structures remained on the public lands 120 days from the effective date of the order, they would become the property of the United States and be subject to removal and disposition by BLM at Myers' expense.

Myers also received the Field Manager's August 20, 1999, decision by certified mail, return receipt requested, on September 1, 1999. On September 15, Myers filed a response to the decision in which he explained each of the new occupancies. On September 23, 1999, he submitted a letter dated September 21, 1999, which apparently was accepted as the covering letter for the undated notice of appeal that immediately follows it in the record. In that one-page covering letter, Myers stated that he was engaged in the lawful use of the public lands, generally asserting that he had done his best to comply with BLM's requests.

In his Notice of Appeal, Myers sought to explain the circumstances surrounding the three additional occupancies and how they serve his prospecting, mining, or processing operations. [4/] This explanation may have been intended, at least in part, as an attempt to comply with the regulations in 43 CFR Part 3715. [5/] While the Notice of Appeal sheds light on the circumstances of the occupancies, appellant does not deny that the ramada and campers were placed on his mining

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[3/] We presume that the "effective date of th[e] order" means the date of receipt by Myers, because that date of receipt triggered the time for complying with its requirements. (Decision at 2.)

[4/] In its Dec. 2, 1999, Answer, BLM requests the Board to dismiss appellant's appeal because he failed to file an adequate SOR. (Answer at 22-23.) We find that appellant's September 1999 submissions sufficiently allege error in the Field Manager's August 1999 decision. See Shogun Oil Ltd., 136 IBLA 209, 212 (1996); Burton A. McGregor, 119 IBLA 95, 98 (1991). BLM's motion to dismiss is therefore denied.

[5/] Myers indicates that his "Notice of Appeal" was submitted "[p]ursuant to the * * * requirements [of] 43 CFR 3715.3-2." (Notice of Appeal at 1.) On appeal, he states that the camp trailers have since been removed from the mining claim. (Letter to Board, dated Dec. 14, 1999, at 3.) It appears that the Dutchman camp trailer was removed from the claim, but the Cree camp trailer was merely moved to the main occupancy site. (Declaration of Jeff Garrett, dated Jan. 26, 2000 (attached to BLM Reply, dated Jan. 27, 2000), at 2.) This does not change the fact that, at the time of the decision, the presence of these camp trailers structures constituted noncompliance with 43 CFR 3715.3.

claim sometime after October 18, 1997, or that he failed to consult with BLM, as required by 43 CFR 3715.3, before placing them there. Instead, Myers contends that the ramada is not a permanent structure; that it is a multi-purpose structure that replaces two buildings previously identified in the Notice of Operations; and that it is important to his prospecting, mining, and/or processing operations. He states that the Dutchman camp trailer is actually owned by one Martin W. Sussek, and is necessary for Sussek's mining operation and for appellant's as well, because it affords Sussek the convenience of a temporary residence when he is conducting his own operations and assisting appellant with his. Myers further states that the other camp trailer is "not a residential site," and that originally it was abandoned by an unidentified person and later purchased by appellant to replace the motor home that was listed in the Notice of Operations. (Notice of Appeal at 4.) He indicates that the trailer will be removed and that the site will be cleaned up.

[1] The pertinent regulation, 43 CFR 3715.6, states that, except where otherwise allowed by applicable laws or regulations, for activities defined as casual use or notice activities under 43 CFR Part 3800 or Subpart 3809, a mining claimant is prohibited from commencing residential occupancy before consulting with BLM as required by 43 CFR 3715.3. 43 CFR 3715.6(c). Consultation with BLM is initiated by the submission of the materials specifically required by 43 CFR 3715.3-2. That section calls for a detailed map that identifies the site and the placement of temporary and permanent structures, and a written description of the proposed occupancy showing how the proposed occupancy is reasonably incident to prospecting, mining, or processing operations and conforms to the requirements of 43 CFR 3715.2 and 3715.2-1. In addition to identifying where structures are to be placed, the mining claimant must describe how long they are expected to be used, and a schedule for removing them and reclaiming the affected land at the end of operations. 43 CFR 3715.3-2. Finally, 43 CFR 3715.3-1 states that a claimant must not begin occupancy until he has complied with 43 CFR Subpart 3715 and BLM has completed its review and made a determination of concurrence or non-concurrence, pursuant to 43 CFR 3715.3-3, 3715.3-4, and 3715.3-5. See 43 CFR 3715.3-6 ("If you have not received concurrence from BLM, you must not begin occupancy").

At the time of the Field Manager's August 1999 decision, it is clear that appellant was engaged in limited prospecting, mining, and/or processing activity which had not disturbed more than five acres of public land. This accorded with his January 8, 1997, notice to BLM, and there is no indication that he had disturbed more than five acres as of the July 8, 1999, BLM inspection. Appellant's activities therefore constituted notice activities under 43 CFR Part 3800 and Subpart 3809. 43 CFR 3715.6(c). See 43 CFR 3809.1-3; Thomas E. Smigel, 156 IBLA at 321.

After the end of the one-year grace period, appellant was required to comply with the requirements of 43 CFR Subpart 3715, including consultation with BLM

before beginning any new occupancy in accordance with 43 CFR 3715.6(c). Thomas E. Smigel, 156 IBLA at 323; Gerald A. Henderson, 156 IBLA 84, 87-88 (2001). Occupancy is defined by 43 CFR 3715.0-5, in relevant part, as

> full or part-time residence on the public lands. It also means activities that involve residence; the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; * * *. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies. [Emphasis added.]

[2] Even though appellant had long occupied the JAH's Gift No. 1 mining claim, the placement on the claim of three additional temporary or permanent structures or items that could be used for residency or in connection with activities involving residency constituted new occupancies, regardless of whether they were actually or continually used for that purpose. Consequently, each required consultation with BLM so that BLM could adjudicate each specific proposed occupancy and issue a "decision" either concurring or not concurring with it. Thomas E. Smigel, 156 IBLA at 323.

The mere "presence" of the ramada and campers, which could be used for residential purposes or activities involving residency, constituted occupancy within the meaning of 43 CFR 3715.0-5. Thomas E. Swenson, 156 IBLA 299, 306 n.7 (2002). It therefore is irrelevant that one of the camp trailers may have been owned by someone other than Myers, because appellant permitted it to be placed on his claim, in part because it served his own prospecting, mining, or processing operations to do so. As a structure capable of being used for residential purposes or activities involving residency, the ramada is likewise properly considered an occupancy within the meaning of 43 CFR 3715.0-5.

Although the record contains several letters from Myers regarding his occupancy of the JAH's Gift No. 1 claim, it is obvious that he never submitted the materials and information required by 43 CFR 3715.3-2. On appeal, Myers does not dispute this conclusion. We find that the record clearly supports BLM's determination that placing the ramada and campers on the mining claim without first consulting BLM initiated new occupancies and constituted prohibited acts under 43 CFR 3715.6(c), for which BLM could require corrective action.

As stated, the Field Manager's August 1999 decision was styled a "Notice of Immediate Suspension." It determined that the placement of the ramada and campers on Myers' mining claim after October 18, 1997, without having first consulted with BLM, constituted noncompliance with the regulations. The decision specified the corrective action required, which was compliance with the consultation

requirements of 43 CFR 3715.3-2 and obtaining BLM's concurrence with such occupancy. (Decision at 2.) The decision directed Myers to remove the ramada and campers within 30 days, but offered him the option of resolving his noncompliance by initiating consultation and filing the necessary information within 15 days of receipt of the decision and seeking BLM's concurrence within 30 days of filing the information. However, while BLM indicated that it would endeavor to make the concurrence decision within 30 days of receipt of the filing, if it did not concur or was unable to complete its review within 30 days, the order to remove the ramada and campers was deemed to have remained effective, and Myers would be required to comply within 45 days of receipt of the decision. In summary, BLM issued an immediate suspension order which was conditioned on subsequent events: Myers could remove the items within 30 days, or initiate consultation within 15 days and either obtain BLM's concurrence or remove the items within 45 days if a concurrence decision was not issued or was denied. For the reasons which follow, we find it necessary to set aside BLM's decision.

[3] An immediate suspension order requires a finding that all or part of the occupancy is not reasonably incident to prospecting, mining, or processing operations, or does not comply with the regulations governing the nature of the use and occupancy of the claim (43 CFR 3715.2). It requires submission of certain information (43 CFR 3715.2-1); that all Federal, state, and local mining, reclamation, and waste disposal authorizations be obtained (43 CFR 3715.3-1(b)); and that all applicable environmental standards and permitting governing occupancy (43 CFR 3715.5) or ending occupancy (43 CFR 3715.5-1) are met. In addition, to issue an immediate suspension order the authorized officer must find that an immediate, temporary suspension is necessary to protect health, safety or the environment. 43 CFR 3715.7-1(a)(1). BLM may presume that public health, safety, or the environment is endangered if the claimant is occupying the public lands under a determination of concurrence and subsequently fails to meet the standards set forth in 43 CFR 3715.3-1(b) or 3715.5(b), (c), or (e). 43 CFR 3715.7-1(a)(2).

An immediate suspension order shall state how the mining claimant has failed to comply, and shall state the action in addition to suspension that is necessary to achieve compliance, and shall establish the time, not to exceed 30 days, within which corrective action must be completed. A suspension order is not stayed or suspended by the filing of an appeal. 43 CFR 3715.7-1(a)(4).

BLM's August 20, 1999, decision cannot be sustained as a "Notice of Immediate Suspension." The decision makes the findings necessary to support the conclusion that Myers' occupancy does not satisfy all regulatory requirements enumerated in 43 CFR 3715.7-1(a)(1)(i), but fails to find that an immediate, temporary suspension is necessary to protect health, safety or the environment as required by 43 CFR 3715.7-1(a)(1)(ii). The necessity of an immediate, temporary

suspension cannot be presumed pursuant to 43 CFR 3715.7-1(a)(2), because that presumption can be invoked only if Myers was operating under a determination of concurrence. As stated, Hutchison's July 8, 1999, field inspection report concluded that Myers' additional occupancies were not reasonably incident because all the mining equipment found on the claim, with the exception of water tanks, could be transported to and from the claim in a small pickup truck. Hutchison stated in the alternative that, even assuming occupancy was reasonably incident, there was no need for the number of occupancies he observed. See Thomas E. Smigel, 156 IBLA at 324-25; Wilbur L. Hulse, 153 IBLA 362, 369-70 (2000); David E. Pierce, 153 IBLA 348, 358-60 (2000). The Field Manager's decision did not state Hutchison's conclusions regarding whether the occupancies were reasonably incident, however. The decision thus failed to make a determination which would have supported a finding that appellant's occupancy constituted unnecessary or undue degradation of the public lands within the meaning of 43 CFR 3715.0-5, which would have justified immediate suspension or cessation pursuant to 43 CFR 3715.7-1(a) or (b). See David E. Pierce, 153 IBLA at 356. As written, the decision thus could not be issued as an immediate suspension order.

[4] Where there is no showing and no finding that an immediate, temporary suspension is necessary to protect health, safety or the environment, 43 CFR 3715.7-1(b) and (c) respectively authorize BLM to issue either a cessation order or a notice of noncompliance. In the former case, BLM may order either a temporary or permanent cessation if the occupancy is not reasonably incident but does not endanger health, safety or the environment; the mining claimant fails to timely comply with a notice of noncompliance; the mining claimant fails to timely comply with an order issued pursuant to paragraph (d) (a party is engaged in an activity that is not reasonably incident but which may be authorized under other regulatory provisions); or the mining claimant fails to take corrective action during a temporary suspension. Howard Sadlier, 156 IBLA 311, 318 (2002). The cessation order shall state how the occupancy is not reasonably incident, constitutes a violation of a notice of noncompliance, or violates another order, and shall state the action necessary to achieve compliance and establish the time, not to exceed 30 days, within which corrective action must be completed. 43 CFR 3715.7-1(b).

We find, however, that the decision also cannot be affirmed as a cessation order. While it is not necessary to show that an occupancy that is not reasonably incident threatens public health, safety, or the environment (43 CFR 3715.7-1(b)(1)(i)), it is necessary to show or determine lack of timely compliance with a notice of noncompliance (43 CFR 3715.7-1(b)(1)(ii)), an order issued pursuant to paragraph (d) (43 CFR 3715.7-1(b)(1)(iii)), or corrective action ordered during a suspension (43 CFR 3715.7-1(b)(1)(iv)). The record contains no such prior order, and accordingly, the decision cannot be deemed to be a cessation order. As a

consequence, the decision can be upheld only if it comports with the prerequisites of 43 CFR 3715.7-1(c) governing notices of noncompliance.

[5] A notice of noncompliance is appropriate when the occupancy fails to comply with any requirement established by Subpart 3715 and BLM has not elected to proceed under 43 CFR 3715.7-1(a). The notice shall state how the mining claimant has failed to comply, and shall state the action necessary to achieve compliance and establish the time, not to exceed 30 days, within which corrective action must be started. 43 CFR 3715.7-1(c)(ii). The notice also shall state the date by which the corrective action shall be completed. 43 CFR 3715.7-1(c)(iii). Unlike immediate suspension orders and cessation orders, the regulation does not require completion of corrective action by a date not to exceed 30 days. It is only when a mining claimant does not commence and complete corrective action by the dates specified that "BLM may order an immediate suspension under paragraph (a) of this section, if necessary, or cessation of the use or occupancy under paragraph (b) of this section." 43 CFR 3715.7-1(c)(2).

The Field Manager's decision clearly sets forth the reasons why the occupancy does not comply, and the corrective action that must be undertaken. Assuming initiating consultation constitutes the start of corrective action, the decision sets a date for doing so. It also sets a date, not to exceed 30 days, by which the corrective action must be completed. See 43 CFR 3715.7-1(c)(1). The decision thus could be deemed a notice of noncompliance.

Whether the circumstances of this case warrant enforcement as an immediate suspension order or a notice of noncompliance we leave to BLM. The decision therefore is set aside and the case is remanded for issuance of an order or notice that comports with the analysis contained in this opinion. One other point deserves brief mention. The decision recognized that BLM might not be able to issue a concurrence determination within 30 days, [6/] but nonetheless required removal of the occupancies within 30 days. (Decision at 2.) In theory at least, a mining claimant would have to correct an occupancy at what could be considerable expense and effort or injury to his operations, even though BLM ultimately might concur in the occupancy, or risk

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[6/] We note, however, that 43 CFR 3715.3-3 requires BLM to complete its review of a proposed occupancy not involving a plan of operations within 30 business days of receipt of the necessary materials, unless the determination cannot be made pending the preparation of environmental documentation or other compliance with other statutory obligations.

exposure to more severe enforcement action [7/] while waiting for action on the concurrence determination. No claimant trying to come into compliance need be disadvantaged by BLM's workload or competing priorities, however, because a notice of noncompliance explicitly allows BLM the flexibility to set the date for completion of corrective action to coincide with issuance of a concurrence determination. See 43 CFR 3715.7-1(c)(iii).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss appellant's appeal from the Field Manager's August 1999 decision is denied, and that decision is set aside and remanded to BLM for appropriate action consistent with this opinion.

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T. Britt Price
Administrative Judge

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[7/] BLM has the authority to seek civil and criminal penalties in Federal court for knowing and willful violations, see 43 CFR 3715.8, although it seems obvious that this case is not at any such juncture. Given the gravity of the civil and criminal penalties that could be imposed by a Federal court or magistrate in appropriate cases, we may safely assume that BLM would not lightly invoke that authority in this or any case.

ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH THE RESULT.

I am satisfied with the result set out in Judge Price's opinion. The August 20, 1999, BLM decision does not comport with the regulations, and should be set aside.

I have a concern not addressed in her opinion. This concern has been somewhat alleviated by her finding that the decision should be set aside, but I believe it appropriate to comment, hoping that by doing so a potential problem can be avoided.

In its decision BLM directed Myers to submit the information called for in 43 CFR 3715.3-2 within 15 days from the date of receipt of its decision. This language comports with 43 CFR 3715.7-1(c)(ii). The next portion of the BLM decision states:

> For these occupancies to remain on public land you must receive a determination of concurrence from the BLM. The BLM will *attempt* to complete the review of your submission within 30 days of the date of your filing. If BLM does not concur with the described occupancy, *or if BLM is unable to complete the review within the time frame*, this order stands as written and you must remove the three new occupancies within 45 days from the effective date of this order.

(Decision at 2, emphasis added.)

This paragraph states the corrective action that Myers must take. It would satisfy the requirements for a notice of noncompliance set out in 43 CFR 3715.7-1(c)(2). However, the approach may be unenforceable as written and opens BLM to unnecessary criticism. Myers has 15 days to submit the necessary information. If he submits it on the 15th day the above language exposes Myers to the issuance of a suspension or cessation order if BLM does not complete its review of the information submitted pursuant to 43 CFR 3715.3-2 at the end of BLM's 30 day review period. Myers must remove the offending structures within 45 days from the effective date of the order. [1/]

I recognize that the regulation at 43 CFR 3715.3-6 provides that a claimant should nor begin occupancy if BLM has not issued a concurrence, even though the 30

[1/] The regulation at 43 CFR 3715.3-3 allows 30 business days to process the request. If BLM intended to conduct its review pursuant to this section, the deadline for removing the offending structures would fall before the end of the review period. In addition, the same would be true if the effective date is deemed to be the date of mailing rather than the date of receipt. (See n. 3 above.)

business days called for in 43 CFR 3715.3-3 has passed without BLM action. However, I believe that if filing a request for concurrence and obtaining concurrence is a stated means of abatement of a notice of violation, BLM should act upon the request for concurrence filed in response to BLM's decision before taking further action, such as issuing a notice of immediate suspension or a cessation order. If concurrence is granted there would be no reason to remove the offending structures. If concurrence is not granted and BLM rejects the claimant's application, the claimant should be afforded a reasonable time following the rejection to remove the offending structures. I believe that the courts would find it difficult to hold that BLM can properly condition the continued occupancy on the filing of an application and then issue a citation for a more serious violation of the same regulation when the more serious violation is triggered by BLM's failure to act upon the application it directed the claimant to file.

As written the failure to remove the structures before the end of the 30 day period allowed for BLM action could result in an immediate willful failure to comply with the notice of violation. Under 43 CFR 3715.8 the willful failure to comply with a BLM order issued under subpart 3715 also exposes the claimant to arrest, trial, penalties up to $100,000, and imprisonment. As I noted in the preceding paragraph, the violation of subpart 3715 could occur because the offending structures were not removed on the day BLM's period for response to the concurrence request expires. The basis for subjecting the claimant to the threat of these penalties is BLM's failure to act within a time frame BLM has established for itself, even though the claimant has done everything that it could to comply with BLM's directive. [2/] The claimant is afforded no opportunity to comply with the regulations if BLM fails to act in a timely manner. It was not intended that BLM's failure to act will render a claimant subject to a cessation order under 43 CFR 3715.7-1(b)(1)(ii) or to fines and imprisonment under 43 CFR 3715.8.

If BLM chooses to issue another decision, I recommend that the decision be worded to provide that a time for response will be afforded, and allow a period for removal in the event that BLM deems the claimant's occupancy to be inappropriate.

_____
R.W. Mullen
Administrative Judge

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[2/] My colleague assumes (safely?) That BLM would not take this action in this case. (See n. 7, above.) I would rather not have to assume that BLM will not initiate the legal proceedings spelled out in its regulations.